The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, SIERRA CLUB, and IDAHO CONSERVATION LEAGUE,

Plaintiffs,

v.

ANDREW WHEELER,[1] in his official capacity as Administrator of the United States Environmental Protection Agency, and R.D. JAMES,[2] in his official capacity as Assistant Secretary of the Army for Civil Works,

Defendants.

Case No. 2:15-cv-01342-JCC

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

NOTED: June 28, 2019

[1] Pursuant to Federal Rule of Civil Procedure 25(d)(1), Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency, is substituted for Scott Pruitt, who was substituted as a defendant for Gina McCarthy.

[2] Pursuant to Federal Rule of Civil Procedure 25(d)(1), R.D. James, Secretary of the Army for Civil Works, is substituted as a defendant for Jo-Ellen Darcy.

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301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

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301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

INTRODUCTION

Plaintiffs challenge a regulatory exemption first promulgated in 1979, revised in 1980, and republished in 1983 and 1986. In 2015, the U.S. Environmental Protection Agency and the Department of the Army ("the Agencies") promulgated a new definition of "waters of the United States" under the Clean Water Act. This 2015 rule expressly does *not* substantively change the long-standing, previously-promulgated exclusion. The Agencies made clarifying, ministerial adjustments to text. They renumbered the provision. They deleted an outdated cross-reference. But Plaintiffs do not challenge either of these changes. Plaintiffs argue that the Agencies should never have established the exclusion decades ago.

This Court has no jurisdiction to consider the challenge for two reasons. First, Plaintiffs have not met their burden to show standing. They have not offered, as they must on summary judgment, specific facts establishing injury, traceability, or redressability.

Second, Plaintiffs' challenge is untimely by several decades. The six-year statute of limitations period to challenge the waste treatment system exclusion began in 1980 and expired long ago. 28 U.S.C. § 2401 (civil actions against the United States must be brought within six years). The only way that Plaintiffs could challenge the exclusion is if the Agencies undertook "serious, substantive" reconsideration of the exclusion in the 2015 rulemaking. *Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). In the proposal for the 2015 rule, the Agencies explicitly stated six times that they were not undertaking substantive review of the exclusion. 79 Fed. Reg. 22,188, 22,189, 22,190 (twice), 22,193, 22,195, 22,217 (Apr. 21, 2014). And the Agencies did not make substantive changes to the exclusion in the final rule. The 2015 rule thus did not reopen the waste treatment system exclusion to substantive challenge.

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

Were this Court to consider the substance of the waste treatment system exclusion, it should follow the reasoning of the only court to have considered the same question. In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, the Fourth Circuit decided that the waste treatment system exclusion is lawful. 556 F.3d 177, 212 (4th Cir. 2009). It is a reasonable interpretation of the scope of waters covered by the Clean Water Act.

BACKGROUND

A. The Clean Water Act

The Clean Water Act ("CWA") generally prohibits unauthorized discharges of pollutants to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas," *id.* § 1362(7), but does not define the term "waters of the United States."

The CWA establishes two permitting programs for authorizing discharges of pollutants to "waters of the United States." For discharges of pollutants other than dredged or fill material, the Environmental Protection Agency ("EPA") or authorized states may issue National Pollutant Discharge Elimination System or "section 402" permits. *Id.* § 1342. For discharges of dredged or fill material, the Secretary of the Army acting through the Army Corps of Engineers ("Corps"), or a state with an approved program, may issue "section 404" permits. *Id.* § 1344(a), (d), (g).

B. Regulatory history of the waste treatment system exclusion

EPA serves as the CWA's chief administrator, 33 U.S.C. § 1251(d), "prescrib[ing] such regulations as are necessary" to carry out the Act's functions. *Id.* § 1361(a). EPA and the Corps have separate regulations defining the statutory term "waters of the United States," but the text of

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301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

the Agencies' regulations has been virtually identical since the late 1980s. *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764 (June 6, 1988).

In 1979, EPA promulgated a revised definition of "waters of the United States" after notice and public comment. 44 Fed. Reg. 32,854 (June 7, 1979). A "frequently encountered comment" was that "waste treatment lagoons or other waste treatment systems should not be considered waters of the United States." *Id.* at 32,858. EPA agreed, except as to cooling ponds that otherwise meet the criteria for "waters of the United States." *Id.* The 1979 revised definition of "waters of the United States" set forth several criteria and provided that "waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States." *Id.* at 32,901 (40 C.F.R. § 122.3(t)).

The following year, EPA revised the exclusion to clarify its application to treatment ponds and lagoons and to specify the type of cooling ponds that fall outside the scope of the exclusion. 45 Fed. Reg. 33,290, 33,298 (May 19, 1980). EPA further decided to revise the exclusion to clarify that "treatment systems created in [waters of the United States] or from their impoundment remain waters of the United States," while "[m]anmade waste treatment systems are not waters of the United States." *Id.* The revised exclusion read:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

45 Fed. Reg. at 33,424 (40 C.F.R. § 122.3).

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301 Howard St., Ste. 1050
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Two months following this revision, EPA took action to "suspend[] a portion" of the waste treatment system exclusion in response to concerns raised in petitions for review of the revised definition of "waters of the United States." 45 Fed. Reg. 48,620 (July 21, 1980). EPA explained that industry petitioners objected to limiting the waste treatment system exclusion to manmade features, arguing that the revised exclusion "would require them to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years." *Id.* at 48,620. The petitioners argued that "[i]n many cases, . . . EPA had issued permits for discharges from, not into, these systems." *Id*. Agreeing that the regulation "may be overly broad" and "should be carefully re-examined," EPA announced that it was "suspending [the] effectiveness" of the sentence limiting the exclusion to manmade bodies of water. *Id.* EPA then stated that it "intend[ed] promptly to develop a revised definition and to publish it as a proposed rule for public comment," after which the Agency would decide whether to "amend the rule, or terminate the suspension." *Id.*

In 1983, EPA republished the waste treatment system exclusion with a note explaining that the agency's July 1980 action had "suspended until further notice" the sentence limiting the exclusion to manmade bodies of water, and that the 1983 action "continue[d] that suspension." 48 Fed. Reg. 14,146, 14,157 (Apr. 1, 1983) (40 C.F.R. § 122.2).

Separately, the Corps published an updated definition of "waters of the United States" in 1986. This regulatory definition contained the waste treatment system exclusion, but it did not include the exclusion's suspended sentence: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as

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San Francisco, CA 94115
(415) 744-6473

defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States." 51 Fed. Reg. at 41,250 (33 C.F.R. § 328.3).

Later revisions to the definition of cooling ponds rendered the exclusion's cross-reference to 40 C.F.R. § 123.11(m) outdated. *See* 47 Fed. Reg. 52,290, 52,291, 52,305 (Nov. 19, 1982) (revising regulations related to cooling waste streams, but deleting definition of cooling ponds).

In 2014, the Agencies proposed a revised definition of "waters of the United States," but explicitly "propose[d] no change to the exclusion for waste treatment systems . . . ." 79 Fed. Reg. 22,188, 22,189 (Apr. 21, 2014). Because the Agencies did not intend to address the waste treatment system exclusion in the rulemaking, the Agencies specified that they "[did] not seek comment on th[is] existing regulatory provision[]." *Id*. at 22,190. The Agencies stated that they were not proposing substantive changes to the waste treatment system exclusion a total of six times. *Id*. at 22,189, 22,190, 22,193, 22,195, 22,217. The Agencies did propose certain "ministerial actions" for the waste treatment system exclusion. *Id*. at 22,217. Specifically, the Agencies sought to renumber the exclusion and to delete the exclusion's cross-reference to an EPA cooling pond regulation that is no longer in the Code of Federal Regulations. The parenthetical to be deleted read: "(other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition)." *Id*. The Agencies made clear that they "[did] not consider this deletion to be a substantive change to the waste treatment systems exclusion or how it is applied." *Id*. The 2014 proposed definition of "waters of the United States" would thus exclude "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." *Id*. at 22,263 (33 C.F.R. § 328.3(b)(1)).

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San Francisco, CA 94115
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Plaintiffs commented on the 2014 proposed rule, arguing that the Agencies should make substantive changes to the waste treatment system exclusion. In these comments, Plaintiff Sierra Club acknowledged that the proposed waste treatment system exclusion was "unchanged from the current regulations." Pls. Ex. 1 at 58-59. Plaintiff Idaho Conservation League described the 2014 proposed rule as a "proposal to retain the so-called waste treatment system exclusion in its current form." Pls. Ex. 2 at 16.

Some commenters noticed that, in addition to deleting the outdated cross-reference to cooling ponds, the Agencies had revised the waste treatment system exclusion in the 2014 proposed rule by adding a comma after "lagoons." 80 Fed. Reg. 37,054, 37,097 (June 29, 2015). In response, the Agencies explained that they did "not intend to change how the waste treatment exclusion is implemented" in the final 2015 rule. The Agencies stated that the 2015 rule would "[c]ontinu[e] current practice" on waste treatment systems. *Id*. To avoid any misunderstanding and to preclude any suggestion that the final rule changed the substantive meaning of the exclusion, the Agencies did not finalize ***the comma*** that had appeared for the first time in the proposed rule. *Id*. at 37,104. The exclusion in the final 2015 rule thus reads "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." *See, e.g.*, *id*. (33 C.F.R. § 328.3(b)(1)). This language is the same as the Agencies' earlier version of the waste treatment system exclusion, such as in the 1986 rule, without the cross-reference to the outdated cooling pond regulation. The Agencies noted that though they had received some substantive comments on the waste treatment system exclusion, those comments were "outside the scope of the proposed rule" because the Agencies had not proposed "any substantive changes to the waste treatment system exclusion." *Id*. at 37,097.

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

C. Procedural History

Plaintiffs filed their original complaint challenging the 2015 rule in August 2015. Dkt. No. 1. They argue that the waste treatment system exclusion exceeds the Agencies' statutory authority and is arbitrary and capricious, and that the 2015 rule violates notice-and-comment requirements. Pls. Br., Dkt. 67 at 1. Plaintiffs seek, among other things, to require EPA to open rulemaking proceedings to address the substance of the exclusion. Pls. Br., Dkt. 67 at 16-17.

In early 2017, the President issued an Executive Order directing the Agencies to review the 2015 "waters of the United States" rule at issue in the broader litigation and to publish for notice and comment a proposed rule rescinding or revising the 2015 rule, as appropriate and consistent with law. 82 Fed. Reg. 12,497 (Feb. 28, 2017). Consistent with the President's directive, in July 2017 the Agencies proposed to rescind the 2015 rule. If finalized, this proposal would recodify the prior regulatory definition of "waters of the United States," promulgated by the Agencies in the late 1980s. *See* "Definition of 'Waters of the United States'−Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July 27, 2017). The Agencies sought additional comment on the proposed rescission of the 2015 rule through a supplemental notice of proposed rulemaking. 83 Fed. Reg. 32,227 (July 12, 2018). The public comment period closed in August 2018, and the proposal remains under consideration.

In addition to that rulemaking, on February 14, 2019, the Agencies proposed a new definition of "waters of the United States." 84 Fed. Reg. 4154. In the accompanying Federal Register notice, the Agencies propose to address the substance of the waste treatment system exclusion by defining "waste treatment system" for the first time. *Id*. at 4190. This definition would "clarify which waters and features are considered part of a waste treatment system and

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therefore excluded." *Id*. at 4193. Plaintiffs had the opportunity to submit public comments on the proposed rule, they submitted comments, and in these comments, Plaintiffs make substantive arguments about the appropriate extent of the definition of waste treatment systems. *See* Comment by Earthjustice submitted on behalf of Sierra Club, Puget Soundkeeper, Idaho Conservation League, et al., pp. 45-48, EPA-HQ-OW-2018-0149-4343, *available at* www.regulations.gov.[1]

STANDARD OF REVIEW

Plaintiffs have the burden of proof on summary judgment to prove that they have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On the merits, under the Administrative Procedure Act ("APA"), an agency action is unlawful only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004) (citations omitted). This standard is narrow, and a court is "not [to] substitute [its] judgment for that of the agency." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citations omitted). The agency need only have "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id*. at 1140 (citation omitted). In short, the agency's decision must be upheld so long as it is rational. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

[1] Yesterday, a court in the Southern District of Texas held that the 2015 rule violated the APA's notice-and-comment requirements and remanded the rule for further proceedings without vacating the rule. *See Texas v. EPA*, Civ. Act. No. 3:15-cv-00162 (S.D. Tex. May 28, 2019), Dkt. No. 193. The Agencies are reviewing the decision and considering its implications for this and other litigation over the 2015 rule.

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301 Howard St., Ste. 1050
San Francisco, CA 94115
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Questions of statutory interpretation are governed by the two-step test set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If congressional intent is clear from the statutory language, the inquiry ends. *Id.* at 842-43. If the statute is silent or ambiguous on a particular issue, the Court must accept the agency's interpretation if it is reasonable. *Id.* at 843 & n.11; *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985).

ARGUMENT

Plaintiffs argue that the waste treatment system exclusion, as it continues to appear after the 2015, rule exceeds the Agencies' statutory authority and is arbitrary and capricious; and that the Agencies should have responded substantively to comments that the Agencies did not seek because the Agencies proposed no substantive changes. They also seek unprecedented relief, asking this Court to effectively rewrite an agency regulation. Plaintiffs have no standing to bring this challenge; their facial challenges are untimely; and the exclusion is within the Agencies' authority. If the Court disagrees, the appropriate remedy would be to remand to the Agencies for consideration of substantive comments on the waste treatment system exclusion.

I. Plaintiffs have not shown standing.

The Constitution requires that Plaintiffs have standing. *Lujan*, 504 U.S. at 559-60. That is, they must suffer an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *Id.* at 560-61. When, as here, Plaintiffs are not the object of the disputed exclusion, "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* at 562 (internal quotation marks omitted).

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301 Howard St., Ste. 1050
San Francisco, CA 94115
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Because standing is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case," Plaintiffs must prove standing as they would any other part of the case where they bear the burden of proof. *Id.* at 561. So at summary judgment they must offer, by affidavit or other evidence, "specific facts" of each element of standing. *Id.* (internal quotation marks omitted). Plaintiffs, who tack on their standing argument to the end of their brief almost as an afterthought, have not met their burden. *See* Pls. Br., Dkt. 67 at 12-13.

A. Plaintiffs' vague concerns about potential future discharges are not cognizable injuries.

Plaintiffs must identify particular activities that they say harm them. *See Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1150 (2009). Yet for the most part, Plaintiffs' declarations only paint, in broad strokes, generalized grievances and speculation about future threats to their enjoyment of various waters. *See, e.g.*, Declaration of Chris Wilke (Wilke Decl.), Dkt. 67 at ¶¶ 14-15. Only two declarants name specific projects that allegedly harm them. *See* Declaration of Myron Angstman (Angstman Decl.), Dkt. 67 at ¶ 6; Declaration of James D. DeWitt (DeWitt Decl.), Dkt. 67 at ¶¶ 13-14; *see also* Declaration of Dalal Aboulhosn (Aboulhosn Decl.), Dkt. 67 at ¶ 11 (mentioning same mining project as Angstman Decl.); Declaration of Austin Walkins (Walkins Decl.), Dkt. 67 at ¶ 14.

Of course, just naming names is not enough. Plaintiffs also have to show an "actual or imminent" injury. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). No declarant here claims an "actual" injury. Instead, the declarants voice generalized "concern[]" about the waste treatment system exclusion's *potential* impact on the waters they use. *See, e.g.*, DeWitt Decl., Dkt. 67 at ¶¶ 13-14. But to be "imminent," a threatened injury must be "*certainly* impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted), or

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there must be a "substantial risk that harm will occur," *id.* at 414 & n.5 (internal quotation marks omitted). The Ninth Circuit has held that a "credible threat of real and immediate harm" is needed to satisfy the imminence requirement. *In re Zappos.com*, 888 F.3d 1020, 1027 (9th Cir. 2018). A threat is sufficiently credible if, for example, a laptop containing unencrypted personal information is stolen. *See id.* In contrast, the threat is "far less credible" if no laptop had been stolen and plaintiffs "sued based on the risk that it would be stolen at some point in the future." *Id.* (internal quotation marks omitted). That is, at most, what is present here.

Of Plaintiffs' two declarants who identify specific projects, neither shows an imminent injury. Sierra Club member Myron Angstman expresses "concern[]" about the Donlin Gold Mine Project in Alaska. Angstman, Dkt. 67 at ¶ 10. He worries that a waste treatment system "proposed" for the project "will not perform as intended . . . ." *Id.*; *see id.* ¶ 13 (discussing a "mine plan" to impound certain waters). But the mere speculation of something not performing "at some point in the future" falls far short of the "credible threat of real and immediate harm" that would amount to imminence. *Zappos*, 888 F.3d at 1027 (internal quotation marks omitted).[2]

Similarly, Idaho Conservation League member James DeWitt speaks of generalized "concern[s]" about the risk of discharge from two mining projects in Idaho, one of which is still in the proposal phase. DeWitt Decl., Dkt. 67 at ¶ 14; *see id.* ¶ 13 (discussing "proposal" for mine project that "may" rely on the disputed exclusion). The closest that he gets to fleshing out those concerns is to say that the Hecla Grouse Creek Mine has a "large pile of mine tailings and overburden that generates effluent," which is collected in a settling pond in Pinyon Creek. *Id. Dkt. 67 at* ¶ 14. But Mr. DeWitt acknowledges that the mine has an EPA permit that regulates discharges from the point where Pinyon Creek flows into Jordan Creek, part of the watershed in which he recreates. *Id. Dkt. 67 at* ¶ 14. Critically, he does *not* allege any inadequacy with the permit's effluent limitations, a violation of the permit, or any aesthetic or recreational interests in Pinyon Creek itself. *See id. Dkt. 67 at* ¶¶ 8 & 14. So Mr. DeWitt does not show any possibility of being injured, now or imminently, by conjectured activities at Pinyon Creek that could be allowed by the exclusion.

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[2] Mr. Angstman also says that he "believe[s] that the Corps is relying on the Waste Treatment System Exclusion as the basis for excluding some natural surface waters that current exist within the Donlin Gold Mine Project's designated boundaries . . . ." Angstman Decl., Dkt. 67 at ¶ 13. But on summary judgment, subjective belief is not enough to meet Plaintiffs' burden to show standing. *See Lujan*, 504 U.S. at 561 ("In response to a summary judgment motion . . . the plaintiff can no longer rest on . . . mere allegations" (internal quotation marks omitted)). The Court needs to see "specific facts." *Id.* (internal quotation marks omitted).

B. Plaintiffs cannot show traceability or redressability because they cannot tie any alleged injuries to the ministerial adjustments in the 2015 rule.

Even if their vague concerns could somehow qualify as cognizable injuries, Plaintiffs cannot link those injuries to the ministerial tweaks to the 2015 rule, the only action under review. For one thing, the rule has never applied in Alaska or Idaho, the sites of the three mining projects that Plaintiffs identify as harming them. That is because the 2015 rule was enjoined in those states before it became effective. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). And the injunction remains in effect in Alaska and Idaho. So Plaintiffs' alleged injuries in those states cannot be fairly traceable to the 2015 rule; nor are they redressable by the Court.[3]

[3] Mr. Angstman states that the Donlin mine's permit (issued by the Corps) will harm certain wetlands. Angstman Decl. Dkt. 67 at ¶ 9. But Plaintiffs do not trace any damage specifically to the 2015 rule's exclusion for waste treatment systems. *See id.*

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

As for other states in which Plaintiffs assert generalized aesthetic and recreational interests not traceable to any specific project (Washington and Oregon), without offering specific facts of anything that will happen to the waters there in light of the ministerial adjustments to the 2015 rule, Plaintiffs cannot show injury. *See Summers*, 129 S.Ct. at 1150; Wilke Decl., Dkt. 67 at ¶¶ 8-12 (describing recreation in various waters around Washington's Puget Sound); DeWitt Decl., Dkt. 67 at ¶ 7 (mentioning trips to wildlife refuge in Oregon and its wetlands). Nor can they fairly trace their concerns to the 2015 rule. Although the 2015 rule currently applies in Washington and Oregon, that has not always been the case. In fact, for the better part of its existence, the 2015 rule either has been enjoined or had its applicability date delayed—meaning that during those periods, the rule did not apply anywhere in the country. *See Puget Soundkeeper All. v. Wheeler*, 2018 WL 6169196, at *1-2 (W.D. Wash. Nov. 26, 2018) (Coughenour, J.) (recounting rule's history). Plaintiffs make no effort to tie the timing of anything that they say harms them to the short period when the 2015 rule has applied in Washington and Oregon.

More to the point, any alleged injury here is not redressable. If the Court agrees with Plaintiffs' merits arguments, the *most* it can do is vacate the ministerial adjustments of the 2015 rule. *See infra* Argument Section IV. The Court cannot, as Plaintiffs urge, direct EPA to take any specific action on waste treatment systems. *See, e.g.*, *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (holding that courts impermissibly usurp administrative functions when dictating to agency how to exercise its discretion on remand); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (explaining that remand is proper remedy if record does not support agency action or is otherwise inadequate); 5 U.S.C. § 706(2)(A) (limiting court's authority to

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

"hold[ing] unlawful and set[ting] aside" an action found to be arbitrary and capricious); Pls. Br., Dkt. 67 at 16-17.

Specifically, vacatur can only restore the status quo preceding the 2015 rule. And that status quo, as Plaintiffs admit, is, in substance, the same as the 2015 rule's exclusion of waste treatment systems. *See* Pls. Br., Dkt. 67 at 7 (describing 2015 rule's exclusion as "chang[ing] what was originally adopted as a temporary measure into a permanent exclusion"); Pls. Ex. 1 at 58-59 (stating that the proposed exclusion "is unchanged from the current regulations"); Pls. Ex. 2 at 16 (similar). In other words, even if the Court vacated the 2015 rule's changes to the longstanding exclusion, the regulatory regime in place will continue to exclude the exact same set of waste treatment systems as the regulatory language under the 2015 rule: "Waste treatment systems, including treatment ponds or lagoons designed to meet the [CWA's] requirements . . . ." 51 Fed. Reg. at 41,250. That "change" cannot redress any injuries Plaintiffs suffer.

Having failed to present specific facts of an injury in fact that is traceable to the 2015 rule and that is redressable, Plaintiffs cannot meet their burden to show standing. This Court thus has no jurisdiction to consider their claim.[4]

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[4] Although some of Plaintiffs' declarants mention their procedural interest in commenting on the disputed exclusion, *see, e.g.*, Aboulhosn Decl., Dkt. 67 at ¶¶ 13-14, Walkins Decl., Dkt. 67 at ¶ 15, Plaintiffs' brief does not assert procedural standing. *See* Pls. Br. at 12-13. And even if it did, the Supreme Court has made clear that "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers*, 129 S.Ct. at 1151. Having failed to show an injury in fact, *see supra* Argument Section I.A, Plaintiffs cannot rely on procedural rights for their standing. *See Summers*, 129 S.Ct. at 1151.

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

II. Plaintiffs' substantive challenge is untimely because the 2015 rulemaking did not reopen the exclusion for waste treatment systems.

The 2015 rule did not substantively change the challenged waste treatment system exclusion. The exclusion is the same as it was prior to the 2015 rule, except that the Agencies renumbered the provision and deleted an outdated cross-reference not at issue in this case. Plaintiffs' arguments are untimely because the challenged exclusion was promulgated more than thirty years ago.

Plaintiffs' facial challenge to the exclusion arises under the APA, and the general statute of limitations for civil actions against the United States applies to APA actions. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991). That limitations period is "six years after the right of action first accrues." 28 U.S.C. § 2401(a). Plaintiffs' right of action first accrued in 1980, when EPA first suspended a limitation to the waste treatment system exclusion and decided that further substantive changes to this exclusion would require further rulemaking. Plaintiffs themselves recognize that a suspension can be a substantive change subject to judicial review. Pls. Br., Dkt. 67 at 10. We are now decades past the six-year limitations period to challenge the exclusion as modified in 1980, so Plaintiffs' facial challenge here is barred.

Plaintiffs make no mention of the limitations period, but appear to believe that they have a new right of action to challenge the omission of the language suspended in 1980. Even if that were true, this omission is not new to the 2015 rule. Rather, the omission dates back to at least 1986, when the Corps issued a revised definition of "waters of the United States." The 1986 regulation omitted the suspended language from the C.F.R. 51 Fed. Reg. at 41,250 (33 C.F.R. § 328.3). There is no note of the suspended state of the exclusion's second sentence in the Federal Register. *Id*. The second sentence simply does not appear. *Id*. Plaintiffs might have made their

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

argument that the omission was a substantive change and sought review of the 1986 regulation—at least until 1992. Instead, Plaintiffs waited until now to raise a substantive challenge to a regulation that remains substantively unchanged. This challenge is untimely.

Plaintiffs could seek to overcome the statute of limitations if the Agencies had reopened the substance of the waste treatment system exclusion to challenge when the Agencies proposed to modify the exclusion in 2014. But Plaintiffs cannot "bootstrap" their substantive case against the exclusion to the limited, ministerial revisions proposed by the Agencies. *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989). The Ninth Circuit generally follows D.C. Circuit precedent on the statute of limitations for challenges to agency regulations. *Wind River Mining Corp.*, 946 F.2d at 715. And the D.C. Circuit has repeatedly held that a longstanding regulatory provision is not reopened to a facial challenge unless the agency has reconsidered the provision, offered a rationale, solicited substantive comments, and responded to those comments. *Am. Iron & Steel Inst.*, 886 F.2d at 397. Reopening occurs only if the agency undertakes a "serious, substantive reconsideration" of the existing rule. *Nat'l Mining Ass'n*, 70 F.3d at 1352.

The Agencies did not substantively reconsider the waste treatment system exclusion in the 2015 rule. They did not purport to reexamine, reconsider, or invite comment on the substance of this exclusion. Rather, in the proposed rule, the Agencies explicitly stated that they were *not* seeking substantive comment on the exclusion. 79 Fed. Reg. at 22,217 ("The agencies do not propose to address the substance of the waste treatment system exclusion . . . ."). They merely proposed ministerial changes (renumbering the provision and deleting an outdated cross-reference not at issue here). *Id.* at 22,190. In the final 2015 rule, the Agencies reaffirmed their intent not to substantively reconsider the exclusion. Indeed, when commenters suggested a new

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
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comma in the proposed rule might be substantive, the Agencies explained that they never "intend[ed] to change how the waste treatment exclusion is implemented." 80 Fed. Reg. 37,054, 37,097 . So they deleted the comma, to preclude any future suggestion (as here) that the Agencies were substantively modifying the exclusion.

Plaintiffs acknowledged that the Agencies proposed no substantive change to the exclusion, even though they submitted substantive comments on the waste treatment system exclusion. Pls. Ex. 1 at 58-59; Pls. Ex. 2 at 16. In their brief, Plaintiffs recognize that the proposed rule did not seek comment on the underlying rationale for the exclusion. Pls. Br., Dkt. 67 at 8. The Agencies did not respond to Plaintiffs' substantive comments on the exclusion because its substance was never at issue in the 2014-2015 rulemaking. The Agencies have no legal obligation to respond to irrelevant comments. *See Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). Individuals cannot, through their comments, commandeer the discretion and resources of the Agencies and force them to reopen the substance of the waste treatment system exclusion. *Am. Iron & Steel Inst.*, 886 F.2d at 398 (receipt of comments "on matters other than those actually at issue" does not "re-open[]" regulations). Plaintiffs have missed the deadline to raise their substantive challenge to this longstanding exclusion by several decades. And because the disputed exclusion was not re-opened for substantive debate when it was republished with ministerial changes, the Agencies did not violate any notice and comment procedures.

III. Plaintiffs' claim is meritless because the exclusion is permissible and reasonable.

If the Court reaches the merits of the waste treatment system exclusion, it should reject Plaintiffs' argument that the exclusion exceeds the Agencies' authority under the CWA.

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301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

Plaintiffs first argue that the exclusion violates the CWA's plain language because the statute does not authorize the Agencies to remove "waters of the United States" from the Act's protections. Pls. Br., Dkt. 67 at 6-7. This argument ignores CWA section 404, 33 U.S.C. § 1344. This section provides statutory authorization for jurisdictional waters to be filled under certain conditions. Once jurisdictional waters are filled, they may no longer be waters, resulting in the removal of jurisdiction. Plaintiffs are thus incorrect that the CWA's plain language bars removal of jurisdiction.

Plaintiffs are also wrong that the CWA is unambiguous as to waste treatment systems. It was not a foregone Congressional conclusion that such systems would be regulated as "waters of the United States." The Clean Water Act's prohibitions extend to "navigable waters," further defined as "waters of the United States," with no mention of waste treatment systems. 33 U.S.C. §§ 1311(a), 1362(12), 1362(7).

Plaintiffs are then left with their argument that the waste treatment system exclusion does not fulfill the express purpose of the Clean Water Act to protect the "chemical, physical, and biological integrity" of waters. 33 U.S.C. § 1251(a). Preliminarily, even if there were a conflict between the exclusion and the generalized statutory purposes Plaintiffs cite, "no legislation pursues its purposes at all costs." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (alteration in original) (citations omitted). "[T]he textual limitations upon a law's scope are no less a part of its 'purpose' than its statutory authorizations." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). There is no facial contradiction between the Agencies' waste treatment exclusion and the statutory protection of "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The Court assumes "that the ordinary meaning of [the statutory] language accurately expresses

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

the legislative purpose." *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010)). And the ordinary meaning of the CWA does not clearly require what Plaintiffs advocate.

The only court to have directly considered whether the waste treatment exclusion was *ultra vires* concluded that the exclusion is not. In *Ohio Valley Environmental Coalition*, the Fourth Circuit held that the definition of "navigable waters" as "waters of the United States" was "sufficiently ambiguous" that the "Corps has the authority to determine which waters are covered by the CWA," including the authority to decide whether waste treatment systems were or were not "waters of the United States." 556 F.3d at 212. Plaintiffs acknowledge this decision. They say that the court erred in its analysis by asking whether the CWA unambiguously includes certain waters, not whether the statute unambiguously prevents the exclusion of certain waters. Pls. Br., Dkt. 67 at 7 n.3. These questions collapse together. Congress did not draw unambiguous boundaries around waste treatment systems when it extended CWA jurisdiction over "navigable" waters, meaning "waters of the United States." Neither term expressly includes or excludes waste treatment systems.

To be sure, there is a reasonable limit to the interpretation of any ambiguous term, *Chevron*, 467 U.S. at 842-43, and the reasonableness of the exclusion is at the heart of Plaintiffs' concerns. Since promulgating the exclusion, the Agencies have consistently found that the exclusion reasonably applies to waste treatment systems designed to meet the requirements of the CWA, such as those constructed pursuant to a section 404 permit. *See Ohio Valley Envtl. Coal.*, 556 F.3d at 214-15 (finding that the Agencies' administrative positions and implementation of the exclusion has been consistent). The CWA section 402 permitting program also helps ensure that a waste treatment system complies with the Act by regulating discharges from the system into receiving waters.

Thus, contrary to Plaintiffs' suggestion, Pls. Br., Dkt. 67 at 6-7, there is no conflict between the waste treatment system exclusion and the CWA's fundamental goals. The exclusion does not free a discharger from the need to comply with the CWA for pollutants discharged from a waste treatment system to a water of the United States. The waste treatment system exclusion exempts only those discharges that remain within the treatment system itself. *See N. Cal. River Watch v. Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007) ("The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds.") (citing 45 Fed. Reg. 48,620-21 (July 21, 1980)) (emphasis in original). Thus, the waste treatment system exclusion is distinguishable from the categorical "point source" exemptions that Plaintiffs note some courts have found to be *ultra vires*. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). The CWA does not expressly require that releases should be regulated twice: once when discharged into the waste treatment system, and a second when discharged from the waste treatment system into a receiving water.

Plaintiffs take particular issue with the Agencies' interpretation of the exclusion as extending beyond manmade waste treatment systems originally constructed outside of navigable waters. But to prevail in a facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the regulation would be valid." *Reno v. Flores*, 507 U.S. 292, 300 (1993) (internal citations, quotation marks and brackets omitted). As the Fourth Circuit has recognized, the Agencies have interpreted the waste treatment system exclusion in different ways. *Ohio Valley*, 556 F.3d at 213. The 2015 rule does not codify or modify any particular interpretation of

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301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

the exclusion. The applicable text remains the same as it was prior to the 2015 rule. If Plaintiffs disagree with the Agencies' interpretation of the regulation, they must challenge the application of that interpretation in a permitting decision or other application of that interpretation. Their facial challenge to the exclusion, however, must fail because Plaintiffs themselves recognize that there is an interpretation of the exclusion that would be valid.

IV. If the Court rules against the Agencies on the merits, the appropriate remedy is remand.

This Court should grant summary judgment to the Agencies because Plaintiffs lack standing and their challenge is untimely and unmeritorious. If the Court decides otherwise, the appropriate remedy would be to remand the 2015 adjustment to the exclusion to the Agencies. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). The only other option in this rulemaking challenge is to remand and vacate the changes to the exclusion in the 2015 rulemaking. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

Instead of requesting remand or remand with vacatur, Plaintiffs make an extraordinary and unprecedented demand for an injunction that would require the Agencies to act as if there is additional language in the waste treatment system exclusion—the same language that the Agencies previously suspended. Pls. Br., Dkt. 67 at 16-17. It is well-established that courts cannot "exercise an essentially administrative function" and effectively rewrite a regulation contrary to the agency's intent. The Supreme Court decided in 1952 that the power to "modify or

Simi Bhat
301 Howard St., Ste. 1050
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set aside" administrative decisions does not include the power to change an administrative decision. *Idaho Power Co.*, 344 U.S. at 87. There, the Supreme Court interpreted the reach of the Federal Power Act, which—even more broadly than the APA—allows courts to "affirm, *modify* or set aside" orders of the Federal Power Commission. *Id.* (emphasis added) (internal quotation marks and citations omitted). Yet the Court decided that it lacked authority to modify the Commission's order by removing conditions the agency set in the order. *Id.* To do so would invade the executive's province to implement the law. *Id.*; *see also Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Plaintiffs bring this case under the APA, which, like the Federal Power Act, allows courts to "set aside" administrative decisions (but not "modify" these decisions). *See* 5 U.S.C. § 706(2). And like the Federal Power Act, the APA does not allow courts sitting in review of agency action to essentially construct a different action that the agency did not intend. "[T]he guiding principle" of judicial review of administrative decisions "is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Idaho Power Co.*, 344 U.S. at 20. The options before this Court are to remand the 2015 rule adjustments to the Agencies for further consideration, or otherwise to remand and vacate the 2015 rule adjustments, leaving the preceding version of the regulation with the cross-reference in place.

Vacatur would be inappropriate in this case. In assessing whether vacatur is necessary, courts consider "how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys.Against Toxics*, 688 F.3d at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). The

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301 Howard St., Ste. 1050
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(415) 744-6473

Agencies made limited, non-substantive changes to the waste treatment system exclusion in the 2015 rulemaking—deleting an outdated cross-reference and renumbering the provision. Any errors in promulgating these ministerial changes would be themselves limited, and vacating these changes would cause unnecessary confusion, especially as the Agencies are currently considering further changes to the waste treatment system exclusion.

On February 14, 2019, the Agencies proposed substantive modifications to the waste treatment system exclusion. 84 Fed. Reg. at 4193. Plaintiffs have now had the opportunity to make the substantive comments that they argue the Agencies should have considered in the 2015 rulemaking. The Agencies will consider the substantive reasons for and against the waste treatment system exclusion before making a decision on the 2019 proposal. There is no need for the Court to vacate the 2015 changes to the waste treatment system exclusion during this interim period before a decision on the 2019 proposal.

Even if injunctive relief of the form Plaintiffs seek were available in rulemaking cases, Plaintiffs have not established that they meet the four required criteria for a permanent injunction: irreparable harm, inadequate legal remedies, imbalance of hardships, and disservice to the public interest. As discussed earlier, Plaintiffs are not harmed by the waste treatment system exclusion or the 2015 changes to the disputed exclusion, much less irreparably so. *See supra* Argument Section I.A. Plaintiffs appear to argue that if the Agencies finalize the new 2019 proposed changes to the waste treatment system exclusion, Plaintiffs will be forever harmed by the waste treatment system exclusion. But the Agencies retain discretion to decide how to modify the waste treatment system exclusion. They may not finalize the proposed language. And if they do, Plaintiffs will have the opportunity to seek judicial review of the final rule. The

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

Supreme Court has recognized that permanent injunctions against agency decisions are not appropriate when the agency is contemplating a revision of that decision, and litigants "may file a new suit challenging such action . . . ." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010). Any injury to Plaintiffs will not be irreparable, and Plaintiffs will have sufficient legal recourse to challenge the substance of the waste treatment system exclusion.

Further, neither the balance of hardships nor the public interest justifies an injunction. Executive agencies should not be barred from exercising their discretion in any manner consistent with law. And Plaintiffs' injunction would unlawfully curtail agency discretion to define waste treatment systems in any reasonable manner and effectively impose regulatory language suspended decades earlier. *Id.* Again, neither the waste treatment system exclusion nor the 2015 adjustments to the exclusion at issue in this case have caused Plaintiffs any hardship. Stifling executive agencies' abilities to apply their expert judgment and reasonably improve regulations will have a profoundly negative impact on federal agencies, not just in this case, but in all cases challenging regulations. This will in turn negatively affect the American people, who are benefited by regulations created by impartial and expert agencies, not special interest groups.

Finally, Plaintiffs have abandoned their claim that the Agencies have unreasonably delayed in addressing the substance of the waste treatment system exclusion. Because the Agencies are currently considering the substance of this provision in their 2019 rulemaking, there is no need for the Court to direct the Agencies to do so. Because the Agencies did not err in promulgating the 2015 ministerial modifications to the waste treatment system exclusion, the Agencies' motion for summary judgment should be granted, Plaintiffs' motion for summary judgment should be denied, and this case should be dismissed.

Simi Bhat
301 Howard St., Ste. 1050
San Francisco, CA 94115
(415) 744-6473

Respectfully submitted on May 29, 2019.

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General

/s/ Simi Bhat
SIMI BHAT
MARTHA MANN
SUE CHEN
DANIEL DERTKE
ANDREW DOYLE
United States Department of Justice
Environmental Defense Section
301 Howard St., Ste. 1050
San Francisco, CA 94115
Tel.: (415) 744-6473
simi.bhat@usdoj.gov